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Loyola of Los Angeles Law Review

Volume 53 | Number 3 Article 6

Spring 5-1-2020

Hot Off the Press: An Argument for a Federal Shield Law Affording a Qualified Evidentiary Privilege to Journalists in Light of Renewed Concerns About Freedom of the Press and National Security

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HOT OFF THE PRESS: AN ARGUMENT FOR A FEDERAL SHIELD LAW AFFORDING A QUALIFIED EVIDENTIARY PRIVILEGE TO JOURNALISTS IN LIGHT OF RENEWED CONCERNS ABOUT FREEDOM OF THE PRESS AND NATIONAL SECURITY

*Nicole N. Wentworth**

I. INTRODUCTION

Journalists who are forced to choose between revealing a source or maintaining confidences face very real consequences for their decision. Reporters have spent time in jail, been released of confidentiality from their sources to avoid jail time, or paid fines for refusing to reveal sources.[1] For example, Judith Miller, a reporter for the *New York Times*, controversially spent eighty-five days in jail for refusing to reveal her source after being subpoenaed.[2] More recently, James Risen, also a reporter for the *New York Times*, appealed to the Supreme Court after he was subpoenaed to testify about the identity of his confidential source.[3] Although his appeal was denied,

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1. *See, e.g.*, *A Look at the Last Nine US Reporters Who Faced the Possibility of Jail Time*, COLUM. JOURNALISM REV. (July/Aug. 2014), https://archives.cjr.org/opening_shot/opening_shot_july_august_2014.php; *Journalists Jailed or Fined for Refusing to Identify Confidential Sources, as of 2019*, REPORTERS COMM. FOR FREEDOM PRESS, https://www.rcfp.org/jailed-fined-journalists-confidential-sources/ (last visited Feb. 23, 2020).

2. *Journalists Jailed or Fined for Refusing to Identify Confidential Sources, as of 2019*, *supra* note 1. Miller never published an article based on her source's information, but she was subpoenaed to testify before a federal grand jury investigating a leak naming a CIA officer. She was released when her source waived confidentiality and she subsequently agreed to testify. The ordeal became colloquially deemed, "The Plame Affair." *Timeline: The CIA Leak Case*, NPR (July 2, 2007, 5:00 AM), https://www.npr.org/templates/story/story.php?storyId=4764919.

3. Federal prosecutors subpoenaed Risen to name the CIA agent who was a source for his book investigating CIA activities in Iran. Matt Apuzzo, *Times Reporter Will Not Be Called to*

prosecutors ultimately did not force Risen to choose between identifying his source or facing jail time.[4] Most journalists facing these circumstances have stressed the importance of maintaining confidentiality to do their jobs, and have said they are willing to face jail time rather than reveal a confidential source.[5] Concern about an evidentiary privilege for journalists seems to reemerge into the public discourse whenever a prominent journalist is facing jail time in contempt of court for refusing to reveal a source.

Recently, the relationship between the Trump administration and the press has sparked a renewed debate about a federal shield law.[6] In particular, President Trump's response to an anonymous op-ed essay published in the *New York Times* reignited fear for the freedom of the press in the United States.[7] Trump called the op-ed, which criticized him and described a "resistance" within the White House, an act of treason.[8] Trump subsequently suggested the identity of the source

Testify in Leak Case, N.Y. TIMES (Jan. 12, 2015), https://www.nytimes.com/2015/01/13/us/times-reporter-james-risen-will-not-be-called-to-testify-in-leak-case-lawyers-say.html.

4. *Id.*

5. *See, e.g.*, Gordon T. Belt, *Jailed & Subpoenaed Journalists—A Historical Timeline*, FREEDOM F. INST., https://www.freedomforuminstitute.org/wp-content/uploads/2016/10/Jailed-subpoenaed-timeline1.pdf (last updated Feb. 2010).

6. *See, e.g.*, Paul Fletcher, *Sessions' Testimony Prompts New Federal Shield Law Bill Protecting Journalists*, FORBES (Nov. 29, 2017, 8:45 AM), https://www.forbes.com/sites/paulfletcher/2017/11/29/sessions-testimony-prompts-new-federal-shield-law-bill-protecting-journalists/#1a4fe1384912; Margot Harris, *Is It Finally Time For A Federal Shield Law?*, NEWS MEDIA ALL. (July 27, 2018), https://www.newsmediaalliance.org/fed-shield-law-2018; Jonathan Peters, *The Time Is Right for the Journalist Protection Act. But We Need a Federal Shield Law*, COLUM. JOURNALISM REV. (Feb. 9, 2018), https://www.cjr.org/united_states_project/journalist-protection-act.php.

7. The *New York Times* noted that publishing an op-ed anonymously is a "rare step." *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html. Previously, the *New York Times* had only published a few anonymously written op-ed pieces, usually due to safety reasons. *See, e.g.*, Anonymous, *What My 6-Year-Old Son and I Endured in Family Detention*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/25/opinion/family-detention-immigration.html (written anonymously because of gang-related threats); Marwan Hisham, *Living Beneath the Banner of ISIS*, N.Y. TIMES (Jan. 14, 2016), https://www.nytimes.com/2016/01/15/opinion/living-under-the-sword-of-isis-in-syria.html (written under a pen name to protect the author from being targeted by the Islamic State); Laila, *A Syrian Refugee's Message to the European Union*, N.Y. TIMES (Apr. 1, 2016), https://www.nytimes.com/2016/04/01/opinion/a-syrian-refugees-message-to-the-european-union.html (written by a Syrian refugee in Greece using her first name because her family in Syria faced threats); Shane M., *A Different Iranian Revolution*, N.Y. TIMES (June 18, 2009), https://www.nytimes.com/2009/06/19/opinion/19shane.html (written by a student in Iran who was identified only by his first name).

8. Michael M. Grynbaum, *Anonymous Op-Ed in New York Times Causes a Stir Online and in the White House*, N.Y. TIMES (Sept. 5, 2018),

should be investigated as an issue of national security.[9] Although the Trump administration never formally launched an investigation into the identity of the author of the op-ed,[10] Trump's comments on the matter, in combination with his overall attitude towards the press, have caused an uproar among journalists and First Amendment proponents.

Specifically, Trump's comments have raised concerns about the appropriate balance between national security concerns and the freedom of the press. Trump's attempts to address "leaks" from the White House have enflamed these concerns, as his actions demonstrate a willingness to pursue journalists and the identities of their sources. According to James Comey, the FBI director at the time, when Comey suggested the need to "make an example" of a journalist to dispel further leaks, Trump replied that journalists would be willing to reveal their sources after being jailed.[11]

While Trump has been blamed for a recent decline in the United States' press freedom,[12] the United States has never been well known

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https://www.nytimes.com/2018/09/05/business/media/new-york-times-trump-anonymous.html; Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2018, 3:15 PM), https://twitter.com/realdonaldtrump/status/1037464177269514240.

9. Mark Landler & Katie Benner, *Trump Wants Attorney General to Investigate Source of Anonymous Times Op-Ed*, N.Y. TIMES (Sept. 8, 2018), https://www.nytimes.com/2018/09/07/us/politics/trump-investigation-times-op-ed.html ("I would say Jeff [Sessions] should be investigating who the author of that piece was because I really believe it's national security."); *see also* Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2018, 4:40 PM), https://twitter.com/realdonaldtrump/status/1037485664433070080 ("Does the so-called 'Senior Administration Official' really exist, or is it just the Failing New York Times with another phony source? If the GUTLESS anonymous person does indeed exist, the Times must, for National Security purposes, turn him/her over to government at once!").

10. *See, e.g.*, Associated Press, *Still Anonymous: White House Hunt for Op-Ed Author Fades*, CNBC (Oct. 6, 2018, 8:10 AM), https://www.cnbc.com/2018/10/05/still-anonymous-white-house-hunt-for-op-ed-author-fades.html. *New York Times* op-ed editor Jim Dao has expressed his doubt that the *New York Times* would be forced to reveal its source even with an investigation as "absolutely nothing in the Op-Ed involves criminal behavior." *How the Anonymous Op-Ed Came to Be*, N.Y. TIMES (Sept. 8, 2018), https://www.nytimes.com/2018/09/08/reader-center/anonymous-op-ed-trump.html.

11. Memorandum from James Comey, Dir., Fed. Bureau of Investigation (Feb. 14, 2017), https://www.documentcloud.org/documents/4442900-Ex-FBI-Director-James-Comey-s-memos.html ("[Trump] replied by saying it may involve putting reporters in jail. 'They spend a couple days in jail, make a new friend, and they are ready to talk.'").

12. *2019 World Press Freedom Index*, REPORTERS WITHOUT BORDERS, https://rsf.org/en/ranking (last visited Feb. 23, 2020). Reporters Without Borders primarily blames Trump for the fall in the United States' ranking from forty-one in 2016 to forty-five in 2018, citing his verbal attacks toward journalists, calling the press an enemy of the American people, attempting to block White House access from media outlets, and using "fake news" in retaliation for negative reporting. Notably, Reporters Without Borders also comments on the United States' lack of a federal shield law. *Trump Exacerbates Press Freedom's Steady Decline*, REPORTERS WITHOUT BORDERS (2018), https://rsf.org/en/united-states.

for its respect for the freedom of the press. Presidents have routinely used concerns about national security as a means to control the press. For example, following the September 11, 2001, terrorist attacks, the Bush administration encouraged agencies to remove documents and data from their websites,[13] limited access to the records of former presidents,[14] and limited access to records requests made by any foreign government or international government organization.[15] Despite championing free access to information as part of his campaign, the Obama administration prosecuted more "leakers" under the Espionage Act than any former administration following unauthorized disclosures that the Obama administration insisted revealed state secrets.[16]

But the tensions between the press and the government go back even further than that. For example, in a much-publicized speech before the American Newspaper Publishers Association, President Kennedy explained that recent news articles had hurt national security by exposing details about covert operations of the United States government, and he urged self-censorship of the press.[17] As tensions between the government and the press increased in the 1960s and 1970s, the argument for an evidentiary privilege for journalists first gained popular attention. As anti-war and more radical activist groups formed in response to the Vietnam War, journalism became a powerful tool for spreading alternative viewpoints during a time when people were growing increasingly disillusioned with the

13. Adam Clyner, *Government Openness at Issue as Bush Holds on to Records*, N.Y. TIMES (Jan. 3, 2003), https://www.nytimes.com/2003/01/03/us/government-openness-at-issue-as-bush-holds-on-to-records.html.

14. Exec. Order No. 13,233, 66 Fed. Reg. 56,025 (Nov. 1, 2001). The order was later revoked by President Obama. Exec. Order No. 13,489, 74 Fed. Reg. 4,669 (Jan. 21, 2009).

15. Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 312, 116 Stat. 2383 (2002).

16. Jason Ross Arnold, *Has Obama Delivered the 'Most Transparent' Administration in History?*, WASH. POST (Mar. 16, 2015, 5:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/16/has-obama-delivered-the-most-transparent-administration-in-history/ ("Although the increase may have resulted partly from the discrete decisions of prosecutors as well as improved detection technologies, it also results from the choices of senior officials to prosecute leakers under a law targeting spies.").

17. John F. Kennedy, U.S. President, Address Before the American Newspaper Publishers Association: The President and the Press (Apr. 27, 1961), *in* JOHN F. KENNEDY, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY: 1961 153 (Warren R. Reid ed., 1961) ("Every newspaper now asks itself, with respect to every story: 'Is it news?' All I suggest is that you add the question: 'Is it in the interest of national security?'").

government.[18] Unfortunately, many of these journalists were subpoenaed by prosecutors and law enforcement officials to reveal their sources and confidential information.[19] The tensions between the press and the government rose, resulting in a huge increase in subpoenas issued to journalists.[20] The media began to claim that the government was silencing criticism by suppressing unfavorable commentary and manipulating the press.[21] In response, journalists began to make claims of privilege.[22] These claims resulted in various appeals by the government and the media alike to the Supreme Court, culminating in the Court's first and only decision on whether the First Amendment might afford journalists with an evidentiary privilege.[23]

Oftentimes, sources will not give information to journalists for public access without an assurance that the source will be kept confidential. The Supreme Court has rejected the contention that the First Amendment affords any such evidentiary privileges to journalists facing a grand jury subpoena, and the lower courts have since taken different approaches in criminal cases confronting claims of journalistic privilege.[24] This Note will argue that Congress must pass a federal shield law affording journalists a qualified evidentiary privilege in order to resolve the differences among the lower courts and to ensure the freedom of the press while balancing the need for journalistic integrity and national security concerns. Additionally, this Note will evaluate the advantages and inadequacies of previously proposed federal shield laws and existing state shield laws.

Part II will establish the current state of the law and the legal background surrounding federal shield laws, including an overview of evidentiary privileges and subpoenas, the importance of journalistic freedom, and the ongoing tension between the freedom of the press and national security. Part III will analyze the existing case law and state shield laws, the common arguments made in support and opposition to a federal shield law, and previously proposed legislation.

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18. Karl H. Schmid, *Journalist's Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions from 1973 to 1999*, 39 AM. CRIM. L. REV. 1441, 1449 (2002).

19. *Id.* at 1450.

20. CBS and NBC alone were reportedly served with 121 subpoenas over the course of only two years, most of which involved reports about anti-war groups. Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 245 (1974).

21. *Id.* at 248.

22. Schmid, *supra* note 18, at 1450.

23. *Infra* Part II.

24. *Infra* Part II.

Finally, Part IV will provide the justification for a federal shield law that properly balances the concerns of the freedom of the press and national security.

II. BACKGROUND

A. Legal Background

1. Privileges and Their Rationale

Privileges exclude relevant and reliable evidence from discovery or as evidence at trial to protect an interest the government deems more important than the interest served by admitting the evidence.[25] Some privileges stem from the common law and others are statutorily created. The common law governs a claim of privilege unless the United States Constitution, a federal statute, or rules prescribed by the Supreme Court provide otherwise.[26] In adopting the current federal rules of privileges, Congress rejected rules proposed by the Supreme Court that would have codified specific privileges, including the identity of a government informer.[27] Congress also rejected a proposed rule that would have prevented federal courts from recognizing any other privileges unless they were created by Congress.[28] Thus, the federal courts are free to develop the law of privileges.[29]

Some commonly recognized privileges are attorney-client privilege, accountant-client privilege, spousal privilege, clergy communications privilege, and physician-patient privilege. These privileges are well-rooted in the idea that open communication between the parties is necessary. It is hard to imagine a world in which a client is unable to speak freely with his attorney because the attorney could be called to testify about that information, or where a priest could be forced to testify about what a churchgoer told him in a confessional. The most often-cited argument supporting the existence

25. Schmid, *supra* note 18, at 1448.

26. FED. R. EVID. 501.

27. DAVID P. LEONARD ET AL., EVIDENCE: A STRUCTURED APPROACH 585 (Rachel E. Barkow et al. eds., 4th ed. 2016). Other proposed privileges included an attorney-client privilege (FED. R. EVID. 503, Proposed Draft 1972), a psychotherapist-patient privilege (FED. R. EVID. 504, Proposed Draft 1972), a husband-wife privilege (FED. R. EVID. 505, Proposed Draft 1972), communications to clergymen (FED. R. EVID. 506, Proposed Draft 1972), political votes (FED. R. EVID. 507, Proposed Draft 1972), trade secrets (FED. R. EVID. 508, Proposed Draft 1972), and secrets of state and other official information (FED. R. EVID. 509, Proposed Draft 1972).

28. LEONARD ET AL., *supra* note 27, at 585–86.

29. *Id.* at 585.

of these and other privileges is the utilitarian rationale that privileges promote full and frank communication.[30] As a result, some scholars argue that privileges should be recognized only when it is necessary to promote communication between particular classes of people.[31] Privileges are also justified by the interest of privacy in certain close relationships for human dignity and a sense of fundamental fairness.[32] Thus, privileges exist where the value of promoting confidential communications has been determined to outweigh the value of the relevant evidence in a litigation.[33] However, the value of privacy has not been regarded with as much deference as the utilitarian rationale of required full and frank communication.[34]

2. Subpoena Procedures

Subpoenas are used to require witnesses to provide information when they would not voluntarily participate in the litigation otherwise, or when they would be unwilling or unable to provide the information without a court order. Federal prosecutors have some restrictions on their ability to issue a grand jury subpoena, but generally they are given wide discretion.[35] After a prosecutor issues a subpoena, it can be quashed or modified by the court for a variety of reasons, including if the subpoena requires the person to provide privileged information.[36] Generally, a refusal to quash a grand jury subpoena is not immediately appealable.[37]

If an individual does not appear before the court or provide the requested information, the individual has disobeyed the subpoena.[38] If the witness appears but refuses to testify, the witness is not in contempt if the witness has a valid reason not to testify.[39] However, if the court

30. *Id.* at 584.

31. *Id.* As a result, some evidentiary scholars rejected privileges such as the physician-patient privilege, rationalizing that patients would disclose their medical conditions regardless of privilege in order to receive adequate treatment. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* As a result, privileges relying on privacy rather than utilitarian rationale have been met with various exceptions and even abandoned in some jurisdictions. *Id.*

35. 1 SUSAN W. BRENNER & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 9:2, at 342–43 (2nd ed. 2006).

36. 2 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 276 (4th ed. 2007).

37. *Id.*

38. BRENNER & SHAW, *supra* note 35, § 10:17, at 383.

39. *Id.*

finds that the witness has no valid basis for refusing to comply with the subpoena, but the witness continues to refuse to testify, the prosecutor will need to file a motion to compel the witness to comply.[40] The court will then hold a hearing on the motion at which the witness can explain any reason for refusing to comply with the subpoena.[41] After the hearing, the court may order the witness to comply with the subpoena, and refusal at that point will mean that the individual disobeyed the subpoena.[42] The subpoena is a court order, meaning that willfully violating a subpoena may subject the person to civil or criminal contempt.[43] While the government typically initiates a civil contempt action rather than criminal contempt, the federal rules do not require federal prosecutors to do so.[44]

B. Importance of Journalistic Freedom

The First Amendment of the Constitution reads in relevant part, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[45] The amendment was intended to protect the press and allow the media to serve as a check on the government.[46] Particularly, the Framers were concerned with government censorship of political opposition and sought to prevent censorship of unpopular viewpoints. Indeed, the Supreme Court has often noted the importance of the freedom of the press in a functioning democracy and stated that a free press is vital to the basic purpose of the First Amendment.[47] By promising a free press, the First Amendment ensures an independent

40. *Id.*

41. *Id.* § 10:17, at 384.

42. *Id.*

43. FED. R. CRIM. P. 17(G) ("The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U.S.C. § 636(e).").

44. BRENNER & SHAW, *supra* note 35, § 10:17, at 382; *see also* FED. R. CRIM. P. 17(G) (explaining that the court may hold a witness in contempt without instructing when civil or criminal contempt is appropriate).

45. U.S. CONST. amend. I.

46. *E.g.*, N.Y. Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) ("In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.").

47. *See, e.g.*, *id.* at 717 (Black, J., concurring).

means of verifying the official accounts of information given to the public by the government.[48] As a result, the press is often credited with exposing corruption and government deception to the public.[49] In this way, the press plays a vital role in any democracy by informing the public and educating the electorate, again providing a check on the government.[50]

C. Tension Between the Freedom of the Press and National Security

It is often necessary for the government to maintain secrecy for national security purposes when advantages of information or weapons are only effective if they remain a secret from other nations.[51] Similarly, it is necessary for the government to maintain secrecy when information would reveal disadvantages that would pose threats or cause vulnerability to the nation if it was not kept a secret.[52] However, the concept of secrecy for national security purposes is often in conflict with the democratic notion of freedom of information.[53] As discussed above, a citizenry informed by the press is a necessary check on official misconduct and misguided policy.[54] While transparency in

48. Honorable Martin L. C. Feldman, U.S. Dist. Judge for the E. Dist. of La., Address at the Heritage Foundation: Why the First Amendment Is Not Incompatible with National Security Interests: Maintaining a Constitutional Perspective (Jan. 14, 1987), *in* WHY THE FIRST AMENDMENT IS NOT INCOMPATIBLE WITH NATIONAL SECURITY INTERESTS, 90 HERITAGE LECTURES 1, 6 (1987) ("Public access to information regarding government practices and policies is essential to enlightened public debate and informed self-government. That concept is enshrined in the First Amendment, which ensures that there shall be an independent means of verifying official accounts of transactions of government.").

49. The most classic example is the "Watergate" scandal, where the *Washington Post* was credited with exposing the burgling of the Democratic National Committee headquarters. *See generally* CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN (1994) (outlining the investigative reporting of the *Washington Post* journalists and the subsequent Watergate scandal). Numerous less well-known examples exist. *See* Aymo Brunetti & Beatrice Weder, *A Free Press Is Bad News for Corruption*, 87 J. PUB. ECON. 1801, 1806 (Aug. 2003) (examining the relationship between the freedom of the press and the amount of corruption in various countries); *see also* Christopher Starke et al., *Free to Expose Corruption: The Impact of Media Freedom, Internet Access, and Governmental Online Service Delivery on Corruption*, 10 INT'L J. COMM. 4702, 4704 (2016) (examining how new forms of journalism and media freedom generally have increased the likelihood of exposing corrupt officials).

50. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1201 (Rachel E. Barkow et al. eds., 6th ed. 2019) ("Freedom of the press arguably reflects the important and unique role of informing the public and thereby checking the government.").

51. Feldman, *supra* note 48, at 2–4.

52. *Id.* at 3.

53. *Id.*

54. *Id.* at 6.

government is vital for democracy, citizens generally do not have a First Amendment right to access government information.[55]

The proper balance between the concepts of a free press and national security is heavily debated among scholars and politicians. Information is often classified under national security rationales which presume that the public should not possess some information.[56] The Freedom of Information Act exempts properly classified information from disclosure,[57] and Congress has enacted a regulatory scheme criminalizing the disclosure of information that they believe would be a threat to national security.[58] This regulatory scheme includes the Espionage Act, which criminalizes the willful disclosure of "information relating to the national defense" when the person has "reason to believe" the material "could be used to the injury of the United States or to the advantage of any foreign nations."[59] The Act may encompass journalists who disseminate restricted information related to the national defense.[60]

The judiciary has also commented on the balance of national security with the freedom of the press. In *New York Times Co. v. United States*,[61] colloquially known as the "Pentagon Papers" case, the government sought to prevent the *New York Times* and the *Washington Post* from publishing the contents of a classified study on Vietnam policy.[62] The government argued that the First Amendment was not intended to "make it impossible for the Executive to function or to protect the security of the United States."[63] The government relied on

55. Robert Bejesky, *National Security Information Flow: From Source to Reporter's Privilege*, 24 ST. THOMAS L. REV. 399, 399 (2012).

56. *Id.*

57. Freedom of Information Act, 5 U.S.C. § 552(b)(1)(A) (2012).

58. Feldman, *supra* note 48, at 7–8.

59. 18 U.S.C. § 793 (2012).

60. Feldman, *supra* note 48, at 7. The scope of the Espionage Act is still unclear, but journalists' concern with the scope of the Act was reignited when Julian Assange, founder of WikiLeaks, was charged with violating the Act by seeking and disseminating classified information. The press drew parallels between Assange's activities and the activities of journalists: both had the goal of informing the public about the actions of the government, often information the government did not want to be exposed. *See, e.g.*, Devin Barrett et al., *WikiLeaks Founder Julian Assange Charged with Violating Espionage Act*, WASH. POST, (May 23, 2019), https://www.washingtonpost.com/local/legal-issues/wikileaks-founder-julian-assange-charged-with-violating-espionage-act/2019/05/23/42a2c6cc-7d6a-11e9-a5b3-34f3edf1351e_story.html; *see also Infra* Part III (including a discussion of whether Julian Assange should be considered a "journalist").

61. 403 U.S. 713 (1971) (per curiam).

62. *Id.* at 714.

63. *Id.* at 718 (Black, J., concurring).

national security concerns to make this argument and claimed that the executive branch had the power to "protect the Nation against publication of information whose disclosure would endanger the national security."[64] The Court rejected the government's sweeping claims but recognized the importance of government secrecy. The Court did not go so far as to say that the First Amendment would never permit an injunction against publishing confidential information.[65] However, the Court ultimately decided that the government had not met the heavy burden to prove that it would be improper to disseminate the information.[66]

In an often-cited concurring opinion joined by Justice Douglas, Justice Black argued that the publication of news should never be prevented, and "[s]uch a holding would make a shambles of the First Amendment."[67] Relying on the history and language of the First Amendment, Justice Black wrote that the press must be free to publish news regardless of the source without censorship or restraint.[68] Allowing the executive branch to restrict the freedom of the press by relying on national security concerns would "wipe out the First Amendment."[69] Justice Black rejected that national security could ever be invoked to restrict the public's liberty under the First Amendment, even at the risk of exposing military and diplomatic secrets.[70]

In stark contrast, in his concurring opinion, Justice Stewart wrote that on issues of national security, "the frequent need for absolute secrecy is, of course, self-evident."[71] His rationale was based on the

64. *Id.*

65. The Court's per curiam opinion merely stated that the government had not met the heavy burden established by prior case law. *Id.* at 714. In his concurring opinion, Justice Stewart stated that the government would be able to restrict publication of classified information if it would "surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730 (Stewart, J., concurring).

66. *Id.* at 714 (per curiam).

67. *Id.* at 715 (Black, J., concurring).

68. *Id.* at 717.

69. *Id.* at 719.

70. *Id.* ("The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged.").

71. *Id.* at 728 (Stewart, J., concurring).

inherent presumption that international diplomacy and effective national defense often require secrecy.[72] The Court's ultimate ruling in this case was a result of a careful balance of this concern and the democratic principle of freedom of the press. The result of the Court's ruling and the various concurring opinions is that the press have a general right to disseminate classified information, but this ability is restricted when revealing the information would undermine national security and when the information is not particularly relevant to the public interest.[73]

Claims of national security are susceptible to being invoked improperly by the government as a basis for restriction of freedom of speech.[74] In more than sixty cases, the government has invoked the "state secrets" privilege to block the release in litigation of material that would purportedly cause harm to national security if disclosed.[75] The government has employed the privilege not just for national security, but to protect itself from embarrassment or to prevent exposing government misconduct.[76] For example, the Air Force invoked the privilege in a litigation to keep an accident report confidential.[77] When the report was declassified years later, the accident report did not reveal any state secrets but instead exposed the Air Force's failure to make repairs to the aircraft.[78] The danger of upsetting the balance between national security and freedom of information changes with advances in technology and with each change in administration. The current scheme relies heavily on the courts along with the good faith of the press and the government to strike this balance.

72. *Id.*

73. *Id.* at 714 (per curiam).

74. Feldman, *supra* note 48, at 12.

75. *Government Engaging in Pattern of Cover-Up; Whistleblowers Silenced at the Expense of Our Safety*, ACLU, https://www.aclu.org/other/government-engaging-pattern-cover-whistleblowers-silenced-expense-our-safety (last visited Feb. 23, 2020).

76. *Id.*

77. Barry Siegel, *A Daughter Discovers What Really Happened*, L.A. TIMES (Apr. 19, 2004), https://www.latimes.com/archives/la-xpm-2004-apr-19-na-b29parttwo19-story.html.

78. *Id.*

D. State of the Law

1. *Branzburg v. Hayes*

The landmark Supreme Court case on journalistic privilege is *Branzburg v. Hayes*,[79] a five-four decision in which the Court held that journalists who agree to keep a source confidential do not have a constitutional testimonial privilege under the First Amendment.[80] The case arose when reporter Paul Branzburg refused to testify before state grand juries about his confidential sources.[81] Branzburg had written two articles about the drug trade in Louisville, Kentucky, after observing and interviewing people using drugs.[82] The appellants in the two companion cases, *In re Pappas*[83] and *Caldwell v. United States*,[84] were two reporters covering activity within the Black Panther organization who were also called to testify before grand juries.[85] Ultimately, the Court decided that the First Amendment's freedom of speech and press was not abridged by requiring journalists to appear and testify before state or federal grand juries.[86]

The journalist-petitioners argued for the creation of a journalistic privilege. They argued that in order to gather news, it is necessary that journalists agree to keep their source a secret or agree to publish only part of the facts revealed.[87] If a journalist were forced to reveal this information to a grand jury, sources would be deterred from revealing information. The result would be to the detriment of the free flow of information protected by the First Amendment.[88] Notably, the journalists did not argue for an absolute privilege but asserted they should be afforded a qualified privilege.[89] The privilege would only allow journalists to refuse to appear or testify if the information was unavailable from other sources and the need for the information was "sufficiently compelling to override the claimed invasion of First

79. 408 U.S. 665 (1972).
80. *Id.* at 708.
81. *Id.* at 668–70.
82. *Id.* at 667–68.
83. 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).
84. 266 N.E.2d 297 (Mass. 1971), *aff'g sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).
85. *Branzburg*, 408 U.S. at 672–79.
86. *Id.* at 667.
87. *Id.* at 679.
88. *Id.* at 680.
89. *Id.*

Amendment interests" resulting from the disclosure.[90] The journalists argued the burden on news gathering resulting from forcing reporters to disclose this information outweighed any public interest in obtaining the information.[91]

The majority rejected the journalists' arguments but did recognize the importance of news gathering, free speech, and press.[92] However, the Court ultimately found that requiring a journalist to reveal their source would not constitute an intrusion or restriction upon the press.[93] Justice White, writing for the majority, wrote that the First Amendment "does not invalidate every incidental burdening of the press."[94] Moreover, any burden claimed by the journalists was "uncertain" and would not threaten the majority of confidential relationships between journalists and their sources.[95] The Court placed the public interest in pursuing and prosecuting crimes reported to the press over the public interest in possible future news about crime from undisclosed sources.[96]

Although the Court did not grant any testimonial privilege for journalists, in dicta, the Court commented on the distinction between an absolute and qualified privilege. The Court reasoned that a qualified privilege would not be a satisfactory solution to journalists' fear that sources would be deterred "whenever a judge determines the situation justifies."[97] Thus, the Court seemed to recognize the potential faults in schemes of qualified privilege. Although the Court ultimately decided that any testimonial privileges for journalists should be granted by a legislature rather than the courts,[98] two separate dissents would have held otherwise.

In the first dissenting opinion, Justice Stewart, joined by Justices Brennan and Marshall, argued that the Court's decision would "impair performance of the press' constitutionally protected functions" and

90. *Id.*
91. *Id.* at 681.
92. *Id.*
93. *Id.* at 681–82.
94. *Id.* at 682.
95. *Id.* at 690–91.
96. *Id.* at 695 ("[W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.").
97. *Id.* at 702.
98. *Id.* at 706.

hamper the administration of justice.[99] Justice Stewart argued that the confidential relationship between a journalist and his source "stems from the broad societal interest in a full and free flow of information to the public" vital to a free press.[100] Justice Stewart recognized that confidentiality is essential to the creation and maintenance of a news gathering relationship with informants.[101] He argued that failing to protect this confidential relationship would deter sources from giving information and would deter journalists from gathering and publishing that information.[102] As a result of the majority's decision, a journalist may be forced to choose between being punished for refusing to testify or disclosing confidential information in violation of his professional ethics and impairing his resourcefulness as a journalist in the future.[103] Thus, when the journalist and the source cannot rely on confidentiality, valuable information will not be discovered or be published, to the detriment of the public.[104]

While Justice Stewart recognized the importance of a journalist's evidentiary privilege, he still argued for a qualified, rather than absolute privilege. To compel a journalist to reveal his source, Justice Stewart would have required the government to show probable cause to believe that the journalist has information "that is clearly relevant to a specific probable violation of law," that the information cannot be sought by other means, and that there is a "compelling and overriding interest" in the information sought.[105]

Justice Douglas went a step further, arguing in a separate dissent that an absolute privilege should protect journalists under the First Amendment.[106] He believed that the First Amendment gave the press an "absolute and unqualified" privilege, and that the drafters of the First Amendment had balanced the needs of the government with the need for an uncensored flow of opinion and reporting.[107] Thus, there

99. *Id.* at 725 (Stewart, J., dissenting).
100. *Id.* at 725–26.
101. *Id.* at 728.
102. *Id.* at 728 ("[A]n unbridled subpoena power—the absence of a constitutional right protecting, in any way, a confidential relationship from compulsory process—will either deter sources from divulging information or deter reporters from gathering and publishing information.").
103. *Id.* at 731–32.
104. *Id.* at 736.
105. *Id.* at 743.
106. *See id.* at 712 (Douglas, J., dissenting).
107. *Id.* at 712, 715.

could be no compelling need which qualified a journalist's immunity from appearing or testifying before a grand jury.[108]

Justice Douglas also cautioned that any qualified privilege would be "twisted and relaxed so as to provide virtually no protection at all" as the country's values and politics changed.[109] He chastised the majority for impeding the dissemination of ideas by failing to protect the free press and forcing a journalist to testify.[110] Similar to the journalist-petitioners, Justice Douglas argued that forcing a journalist to testify would quell communication between sources and journalists, and restrain journalists who would fear being forced to reveal their sources.[111] In making this argument, Justice Douglas recognized the preferred position of journalists in an effective self-government system because of their crucial duty to bring information to the public.[112] He feared that without an evidentiary privilege, journalists would become victims of government pressure and their sources would fear exposure, resulting in journalists' inability to provide news beyond that which the government allowed.[113] In making this comment, Justice Douglas noted the importance of the press in inviting radical ideas and challenging the status quo.[114]

Given the close decision, the proper interpretation of the *Branzburg* decision was unclear and left largely to the lower courts. Adding to the confusion was Justice Powell's short concurring opinion, in which he emphasized that the Court's holding was limited.[115] Justice Powell believed that the courts should determine whether a journalist had a privilege against testifying by balancing the freedom of the press with "the obligation of all citizens to give relevant testimony with respect to criminal conduct."[116] Justice Stewart

108. *Id.* at 712.
109. *Id.* at 720.
110. *Id.* at 720–21.
111. *Id.* at 721.
112. *Id.*
113. *Id.* at 722 ("If what the Court sanctions today becomes settled law, then the reporter's main function in American society will be to pass on to the public the press releases which the various departments of government issue.").
114. *Id.* at 721–22.
115. *Id.* at 709–10 (Powell, J., concurring).
116. *Id.* at 710.

characterized Justice Powell's concurrence as "enigmatic," a foreshadowing of the confusion to come in the lower courts.[117]

2. Post-*Branzburg* Lower Court Decisions

After *Branzburg*, the Supreme Court refused to hear another case where a journalist claimed evidentiary privilege against revealing a confidential source.[118] Following the decision, some state and federal courts have followed the majority and afforded no evidentiary privilege to journalists while other courts have applied a qualified privilege as proposed by Justice Stewart's dissent.[119] Following the case-by-case balancing test posited by Justice Powell, most federal appellate courts have interpreted *Branzburg* as recognizing a qualified First Amendment privilege for journalists.[120] In contrast, the Sixth Circuit followed the majority opinion strictly and decided journalists do not have a privilege in grand jury proceedings.[121] Similarly, the Seventh Circuit has decided there is no journalistic privilege beyond requiring that subpoenas are "reasonable in the circumstances."[122] However, federal and state courts have recognized a First Amendment-based journalist's privilege in situations factually different from *Branzburg*.[123] For instance, as the *Branzburg* ruling only addressed journalists' claims of privilege when facing grand jury subpoenas, the situation has differed when prosecutors and criminal

117. *Id.* at 725 (Stewart, J., dissenting). In a footnote, Justice Stewart commented further on Justice Powell's concurring opinion, saying that the opinion left room "for the hope that in some future case the Court may take a less absolute position." *Id.* at 746 n.36.

118. Schmid, *supra* note 18, at 1453–54. Most appeals are based on the theory that *Branzburg* left open the narrow claim for privilege when a journalist is being harassed by the government. *Id.* at 1454.

119. *Id.* at 1453–54.

120. *See, e.g.*, Titan Sports, Inc. v. Turner Broad. Sys., Inc. (*In re* Madden), 151 F.3d 125, 128–29 (3d Cir. 1998); United States v. Smith, 135 F.3d 963, 971 (5th Cir. 1998); Shoen v. Shoen, 5 F.3d 1289, 1292–93 (9th Cir. 1993); United States v. Long (*In re* Shain), 978 F.2d 850, 852 (4th Cir. 1992); United States v. LaRouche Campaign, 841 F.2d 1176, 1181–82 (1st Cir. 1988); Von Bulow v. Von Bulow, 811 F.2d 136, 142 (2d Cir. 1987); United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986).

121. Storer Commc'ns Inc. v. Giovan (*In re* Grand Jury Proceedings), 810 F.2d 580, 584–86 (6th Cir. 1987) (holding that a television reporter had no First Amendment privilege to withhold information sought by grand jury).

122. McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003) ("It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena . . . is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas."); *see also* U.S. Dep't of Educ. v. Nat'l Collegiate Athletic Ass'n, 481 F.3d 936, 938 (7th Cir. 2007) ("There isn't even a reporter's privilege in federal cases.").

123. Schmid, *supra* note 18, at 1442.

defendants have subpoenaed journalists.[124] The result is that following *Branzburg*, whether or not a journalist has an evidentiary privilege has depended largely on what court they have found themselves in.

3. Existing State Shield Laws

The Court in *Branzburg* left open the possibility of state or federal legislation affording either a qualified or absolute privilege to journalists.[125] At the time *Branzburg* was decided, only seventeen states afforded some statutory protection to a journalist's confidential sources, each with varying levels of privilege.[126] After the Supreme Court invited federal and state legislatures to provide protections, more states began to pass state shield laws. As of this writing, forty-eight states and the District of Columbia now afford varying levels of testimonial privileges to journalists through their state statutes or constitution, common law recognition based on the First Amendment, or both.[127] However, state protections vary in scope and none can protect journalists from being compelled to reveal their sources during a federal investigation.[128]

Sixteen states and the District of Columbia have enacted shield laws affording an absolute privilege for journalists protecting their sources.[129] Twenty-four states have enacted shield laws where the

124. Both grand juries and prosecutors seek information from journalists less frequently than criminal defendants but are often more successful. Grand juries and prosecutors are granted subpoena power by statute and common law while criminal defendants have a Sixth Amendment right to compel disclosure of information on their behalf. *Id.* at 1465.

125. Branzburg v. Hayes, 408 U.S. 665, 706 (1972) ("At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable . . . . There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards . . . . It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.").

126. *Id.* at 689 n.27.

127. Harris, *supra* note 6. Wyoming is the only state that has never had a state shield law or a common law privilege for journalists, and as of this writing, no bill has ever been filed in the state legislature. *What's up with Wyoming and the Reporter's Privilege?*, NEWS MEDIA & L., Fall 2008, at 37, 37. Currently, Hawaii does not have a shield law either, as its model shield law had a sunset provision and expired in 2013. Paul W. Taylor, *The Perils of Protecting the Press*, GOVERNING, July 2013, at 16, 16.

128. Harris, *supra* note 6.

129. Alabama (ALA. CODE § 12-21-142 (2019)), Alaska (ALASKA STAT. §§ 09.25.300–09.25.390 (West 2019)), Arizona (ARIZ. REV. STAT. ANN. § 12-2237 (2019)), California (CAL. EVID. CODE § 1070 (West 2009)), District of Columbia (D.C. CODE § 16-4702 (2019)), Indiana (IND. CODE §§ 34-46-4-1 to 34-46-4-2 (2019)), Kentucky (KY. REV. STAT. ANN. § 421.100 (West 2019)), Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2019)), Montana (MONT. CODE. ANN. §§ 26-1-902 to 26-1-903 (2019)), Nebraska (NEB. REV. STAT. §§ 20-144 to 20-147

privilege is qualified or contains exceptions.[130] Eight other states still have not enacted a shield law, but their state courts have recognized a privilege for sources that is qualified or contains exceptions.[131]

Of those states which afford only a qualified privilege, the protections are widely varied. Some shield laws only protect the identity of sources, not unpublished or confidential information; others do the opposite and only protect information and not sources.[132] Some states expressly limit the privilege when information is sought in a libel litigation.[133] Some states even protect journalists from third-

(2019)), Nevada (NEV. REV. STAT. § 49.275 (2019)), New York (N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2009)), Ohio (OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (West 2019)), Oregon (OR. REV. STAT. §§ 44.510–44.540 (2019)), Pennsylvania (42 PA. CONS. STAT. § 5942(a) (2019)), Vermont (VT. STAT. ANN. tit. 12, § 1615 (2019)), Washington (WASH. REV. CODE § 5.68.010 (2019)), and Wisconsin (WIS. STAT. § 885.14 (2019)).

130. Arkansas (ARK. CODE ANN. § 16-85-510 (2019)), Colorado (COLO. REV. STAT. § 13-90-119 (West 2019)), Connecticut (CONN. GEN. STAT. § 52-146t (2019)), Delaware (DEL. CODE ANN. tit. 10, §§ 4320–26 (2019)), Florida (FLA. STAT. § 90.5015 (2019)), Georgia (GA. CODE ANN. § 24-5-508 (2019)), Illinois (735 ILL. COMP. STAT. 5/8-901–5/8-909 (2019)), Kansas (KAN. STAT. ANN. §§ 60-480 to 60-482 (West 2019)), Louisiana (LA. STAT. ANN. §§ 45:1451–45:1454, 45:1459 (2019)), Maine (ME. REV. STAT. ANN. tit. 16, § 61 (2019)), Michigan (MICH. COMP. LAWS §§ 767.5a, 767A.6 (2019)), Minnesota (MINN. STAT. §§ 595.021–595.025 (2019)), New Jersey (N.J. STAT. ANN. §§ 2A:84A-21, 2A:84A021.1 (West 2019)), New Mexico (N.M. STAT. ANN. § 38-6-7 (West 2019)), North Carolina (N.C. GEN. STAT. § 8-53.11 (2019)), North Dakota (N.D. CENT. CODE ANN. § 31-01-06.2 (West 2019)), Oklahoma (OKLA. STAT. ANN. tit. 12, § 2506 (West 2019)), Rhode Island (9 R.I. GEN. LAWS ANN. §§ 9-19.1-1 to 9-19.1-3 (West 2019)), South Carolina (S.C. CODE ANN. § 19-11-100 (2019)), Tennessee (TENN. CODE ANN. § 24-1-208 (2019)), Texas (TEX. CIV. PRAC. & REM. CODE ANN. § 22.024 (West 2019); TEX. CODE CRIM. PROC. ANN. art. 38.11–38.111 (West 2019)), Utah (UTAH R. EVID. CODE § 509 (West 2019)), West Virginia (W. VA. CODE § 57-3-10 (2019), and Wisconsin (WIS. STAT. § 885.14 (2019)).

131. Idaho (Idaho v. Kiss (*In re* Contempt of Wright), 700 P.2d 40 (Idaho 1985)), Iowa (Waterloo/Cedar Falls Courier v. Hawkeye Cmty. Coll., 646 N.W.2d 97 (Iowa 2002)), Massachusetts (*In re* John Doe Grand Jury Investigation, 574 N.E.2d 373 (Mass. 1991); Sinnott v. Bos. Ret. Bd., 524 N.E.2d 100 (Mass. 1988)), Mississippi (State v. Hardin, Crim. No. 3558, (Cir. Ct. Yalobusha Cty., Mar. 23, 1983); Hawkins v. Williams, No. 2900054 (Cir. Cty. Hinds Cty., Mar. 16, 1983)), Missouri (State *ex. rel.* Classic III, Inc. v. Ely, 954 S.W.2d 650 (Mo. Ct. App. W.D. 1997)), New Hampshire (State v. Siel, 444 A.2d 499 (N.H. 1982); Op. of Justices, 373 A.2d 644 (N.H. 1977)), South Dakota (Hopewell v. Midcontinent Broad. Corp., 538 N.W.2d 780 (S.D. 1995)), and Virginia (Brown v. Commonwealth, 204 S.E.2d 429 (Va. 1974); Clemente v. Clemente, 56 Va. Cir. 530 (2001); Philip Morris Cos. v. Am. Broad. Cos., 36 Va. Cir. 1 (1995)).

132. Leslie Siegel, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of Sources and Information*, 67 OHIO ST. L.J. 469, 498 (2006).

133. Georgia (GA CODE ANN. § 24-5-508 (2019)), Illinois (735 ILL. COMP. STAT. 5/8-901–5/8-909 (2019)), Louisiana (LA. STAT. ANN. §§ 45:1451–45:1454, 45:1459 (2019)), Minnesota (MINN. STAT. §§ 595.021–595.025 (2019)), Oregon (OR. REV. STAT. §§ 44.510–44.540 (2011)), Rhode Island (9 R.I. GEN. LAWS ANN. §§ 9-19.1-1 to 9-19.1-3 (West 2019)), and Tennessee (TENN. CODE ANN. § 24-1-208 (2019)).

party subpoenas that could reveal underlying sources.[134] Some states only protect journalists from being held in contempt for failure to disclose information rather than afford them an actual evidentiary privilege, which leaves the journalist vulnerable to other discovery sanctions in a civil litigation.[135]

When the privilege relies on the courts, the qualified privilege is often subject to a balancing test which again varies widely from state to state.[136] Among other factors, state courts will consider the importance of the information to the case, the availability of the information from other sources, and whether the case is civil or criminal.[137] Then, even if the tests are similar, the results will differ widely based on the discretion of the presiding judge. These are merely a few examples of the vast differences that exist among the protections afforded to journalists in the different states.

Even those state shield laws which facially provide an absolute privilege have been undermined in some states. For instance, criminal defendants invoking the Sixth Amendment against a shield law have prompted courts to balance the privilege against the defendant's need for information.[138] Similarly, courts have restricted or eliminated statutory protection when the journalist was an eyewitness or when the journalist was the defendant of a libel suit.[139]

The states also vary in who qualifies as a journalist to be afforded protection in the state. Some states extend the privilege to anyone involved in the news gathering process, such as editors and publishers.[140] Some states only apply the privilege to full-time media employees, while others extend the privilege beyond this narrow scope to student journalists, authors, or online publishers.[141] The differences

134. California (CAL. EVID. CODE § 1070 (West 2009)), Connecticut (CONN. GEN. STAT. § 52-146t (2019)), Montana (MONT. CODE ANN. §§ 26-1-902 to 26-1-903 (2019)), and Washington (WASH. REV. CODE § 5.68.010 (2019)).

135. California (CAL. EVID. CODE § 1070 (West 2009)) and New York (N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2009)).

136. Jonathan Peters, *Shield Laws and Journalist's Privilege: The Basics Every Reporter Should Know*, COLUM. JOURNALISM REV. (Aug. 22, 2016), https://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php.

137. *Id.*

138. 1 DAVID M. GREENWALD ET AL., TESTIMONIAL PRIVILEGES § 8:6 (3d ed. 2019).

139. *Id.*

140. *See, e.g.*, Colorado (COLO. REV. STAT. ANN. § 13-90-119(1)(c) (West 2019)), Florida (FLA. STAT. § 90.5015(1)(a) (2019)), Minnesota (MINN. STAT. § 595.023 (2019)), Oklahoma (OKLA. STAT. tit. 12, § 2506(A)(7) (2019)).

141. Peters, *supra* note 136.

among the states as to who qualifies as a journalist is particularly concerning given the growing use of the internet and new technology in reporting today, which has given rise to a number of independent authors untethered to media companies.

III. ANALYSIS

A. Evaluation of the State of the Law

1. Evaluation of Case Law

The case law as it exists is insufficient to provide reassurance to journalists or their sources that information can be kept confidential. Depending on which circuit the subpoena is issued in, a journalist may have no privilege at all, or a qualified privilege based on subjective standards. Because most federal courts use a balancing test that is left to the discretion of the judge, there is little to no reassurance for journalists that they can keep sources confidential. The particularities of a certain judge can determine whether or not a journalist is forced to comply with a subpoena, something which the journalist has no foresight or control over. Some judges may be more inclined than others to modify or quash a subpoena, and some may be more sympathetic than others to certain parties. In fact, there is already some evidence that courts' decisions based on current privilege case law depend on the identity of the subpoenaing party.[142] Which approach a court follows post-*Branzburg* can also be determinative as it directs the burden of proof required for the subpoenaing party.[143]

As evidenced by the different outcomes in the lower courts post-*Branzburg*, the Supreme Court left many unanswered questions for situations factually distinct from *Branzburg*. For example, it was unclear whether the burden on the subpoenaing party might be lower when information is non-confidential, unlike in *Branzburg* where the information sought was confidential.[144] This provides another layer of confusion for journalists, as the lower courts must decide the level of

142. Schmid, *supra* note 18, at 1466 (finding criminal defendants have lower success rates than grand juries and prosecutors).

143. *Id.* at 1481–82.

144. The First, Third, Fourth, Fifth, and Sixth Circuits have suggested that the party subpoenaing confidential information might be required to meet a higher burden of proof than a party subpoenaing non-confidential information. *Id.* at 1496–97. In contrast, the Ninth Circuit concluded that requests for confidentiality would be irrelevant to the analysis. *Id.* at 1489.

privilege to be afforded in factually unique situations. However, as the Supreme Court has consistently refused to revisit the issue of a potential journalistic privilege, it is unlikely that the Court will grant further guidance on any of these issues. It is even less likely that the Court will reconsider their interpretation of *Branzburg* to afford an evidentiary privilege to journalists under a First Amendment rationale. Thus, legislative action appears to be the most viable option to protect journalists from being forced to identify their confidential sources.

2. Evaluation of State Shield Laws

The result of the vast differences in state-to-state protections is that a journalist who publishes an article may be forced to reveal a source in one state while having a privilege not to do so in another state. In an age where many articles are published online and accessible in all areas of the country and even the world, this causes obvious problems. For example, a reporter working for the *Los Angeles Times* would be protected against a subpoena in a California court under the state's existing shield law. But suppose the article was published and made accessible online, including to residents of Wyoming, a state which has no constitutional, statutory, or common law recognition of a journalistic privilege. Theoretically, Wyoming prosecutors could subpoena the *Los Angeles Times* reporter and compel him to reveal the identity of his confidential sources or information. This inconsistency is a result of the current patchwork scheme of protection that journalists have, and this is merely the simplest example. The results appear even more nonsensical when one considers that someone labeled as a journalist under one state's definition might not be covered under another state's narrower definition of a journalist. Inconsistencies similarly arise when a subpoena is based on a court-created balancing test which is facially similar in two states but generates completely different outcomes based on the tendencies of the state's courts.

With the increase of media created for a global scale and the global accessibility of even local publications as a result of technological advances, journalists need a more reliable basis for claiming privilege over their confidential sources and information. In addition to providing journalists with the protection they currently lack in any federal proceeding, a federal shield law would also provide some security for journalists against subpoenas from prosecutors in

other states. A federal shield law would provide the much-needed consistency the scheme of state shield laws currently lacks.

B. Potential Solutions

1. No Privilege

The main argument against affording journalists any evidentiary privilege is that there is an overwhelming public interest in secrecy for national security. Opponents to journalistic privilege argue that the public interest in dissemination of information is uncertain, while the public interest in maintaining secrecy to protect against a security threat is obvious.[145] Thus, if a journalist reveals classified information publicly, the government could discover the source of the classified information because the journalist has no evidentiary privilege. This scheme would theoretically prevent the leak of classified information that could cause a security threat.

In the criminal context, opponents to a federal shield law argue the privilege would impair a criminal defendant's Sixth Amendment right to access information proving his or her innocence.[146] However, existing privileges have the same effect, and those privileges have been held to be constitutional even in response to Sixth Amendment challenges.[147] As with any privilege, the argument against granting the privilege is that the interest in promoting the relationship is less important than the interest served by admitting the evidence. Opponents to a journalistic privilege thus must overcome the First Amendment implications of a journalistic privilege and the necessity of the free flow of communication between a source and a journalist.

Another argument against journalistic privilege is the uniqueness of the privilege. Current evidentiary privileges are afforded to preserve the secrecy of information due to public policy reasons. For example, the privilege afforded to doctors and patients is intended to allow patients to provide any and all relevant information to their doctor, the privilege between spouses is intended to protect the marital

145. Bejesky, *supra* note 55, at 447.

146. *See* Welsh S. White, *Criminal Law: Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence*, 80 J. CRIM. L. & CRIMINOLOGY 377, 377–80 (1989) (discussing the tension between a criminal defendant's rights and evidentiary privileges); *see also* Schmid, *supra* note 18, at 1444 (finding the majority of subpoenas issued to journalists originate from criminal defendants).

147. GREENWALD ET AL., *supra* note 138, at § 1:60.

relationship, and the privilege afforded to lawyers and clients is necessary to provide proper legal representation. In contrast, a privilege between journalists and confidential sources would protect anonymity in order to release information publicly.[148] Thus, unlike other privileges, the journalistic privilege is driven at least in part by the self-interest of the journalist in releasing a story. This leads opponents of a journalistic privilege to fear that journalists may feel empowered by possessing a secret source and mistakenly overestimate the value of the information being publicly released.[149]

Opponents to journalistic privilege also argue that the privilege would propagate false news stories. This concern is particularly salient with the rise of social media and digital news, which rely on sensationalism to increase readership and generate online advertising revenue.[150] While many of these stories often seem outlandish, studies have shown that people believe them nonetheless.[151] Even more reliable media companies have been exposed for failing to properly verify accounts from confidential sources.[152] However, the journalism profession is based on journalists' own ethical standards, which require them to assess a source's credibility and the value of information.[153] Opponents to journalistic privilege argue that denying an absolute privilege would make journalists even more conscientious about what information they put out to the public without the capability to hide behind a claim of privilege.[154]

Not granting any privilege would also avoid the difficulty in deciding who qualifies for an evidentiary privilege. Opponents fear that people would claim to be journalists to invoke the privilege undeservedly. For example, Julian Assange revealed the misconduct

148. Bejesky, *supra* note 55, at 443.

149. *Id.*; *see also* Branzburg v. Hayes, 408 U.S. 665, 694 (1972) (commenting on journalists' self-interest in claiming the importance of maintaining the secrecy of informants).

150. *See* Elle Hunt, *What Is Fake News? How to Spot It and What You Can Do to Stop It*, GUARDIAN (Dec. 17, 2016, 5:00 PM), https://www.theguardian.com/media/2016/dec/18/what-is-fake-news-pizzagate.

151. *Id.* For example, a poll of Trump supporters revealed that 14 percent believed a false news story that Hillary Clinton was connected to a child sex ring run out of a Washington D.C. pizzeria, while 32 percent of supporters said they weren't sure one way or another. Tom Jensen, *Trump Remains Unpopular; Voters Prefer Obama SCOTUS Pick*, PUB. POL'Y POLLING (Dec. 9, 2016), https://www.publicpolicypolling.com/polls/trump-remains-unpopular-voters-prefer-obama-on-scotus-pick/.

152. Bejesky, *supra* note 55, at 438–39.

153. *Id.* at 445–46.

154. *See, e.g.*, *id.* at 446–47.

of government officials on his website, WikiLeaks, in a highly controversial release of classified information online in 2010. Whether or not Assange qualified as a journalist was unclear given the untraditional news outlet.[155] Some argued that Assange qualified as a journalist because he published "truthful information that is of public interest" while others argued that he was not a journalist, and merely "dumped" the information in whole without providing any judgment or curation.[156] The situation became increasingly complicated when WikiLeaks disseminated documents from the Democratic Party during the 2016 presidential elections.[157] This is merely one example of the problems raised by trying to define the press and journalism in a federal shield law. With the emergence of bloggers and other internet-based media, opponents of a federal shield law worry that there will be broad and overreaching claims of privilege.[158] As the Supreme Court has never clarified who qualifies for the freedom afforded to the press under the First Amendment,[159] any federal shield law would necessarily require Congress to do so.

Lastly, opponents argue that journalists are sufficiently protected without a federal shield law. The majority in *Branzburg* noted that the Attorney General's set of rules for federal officials in connection with subpoenaing members of the press to testify may be sufficient to resolve the disagreement between the press and federal officials.[160] Department of Justice guidelines intend to limit the federal government from subpoenaing journalists in federal proceedings. The policy encourages striking the "proper balance" among several interests including protecting national security and safeguarding the

155. *Id.* at 454–55.

156. David Ignatius, Opinion, *Is Julian Assange a Journalist, or Is He Just an Accused Thief?* WASH. POST (Apr. 11, 2019), https://www.washingtonpost.com/opinions/is-julian-assange-a-journalist-or-is-he-just-an-accused-thief/2019/04/11/38afac3c-5c9c-11e9-9625-01d48d50ef75_story.html.

157. Mark Hosenball, *WikiLeaks Faces U.S. Probes into 2016 Election Role and CIA Leaks: Sources*, REUTERS (Dec. 7, 2017), https://www.reuters.com/article/us-usa-trump-russia-wikileaks/wikileaks-faces-u-s-probes-into-its-2016-election-role-and-cia-leaks-sources-idUSKBN1E12J2.

158. Bejesky, *supra* note 55, at 445–47.

159. Ignatius, *supra* note 156.

160. Branzburg v. Hayes, 408 U.S. 665, 707 n.41 (1972) (arguing the regulations "may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials").

role of the free press.[161] The guidelines purport to limit subpoenas to verifying the published information, require the government to exhaust all alternative sources of information, and recommend prosecutors negotiate with the journalist before using their subpoena authority.[162] While the guidelines state that failure to comply with these requirements may constitute grounds for reprimand or other disciplinary action, this disciplinary impact is at the discretion of the Attorney General and does not create any legal right to an individual who was faced with a subpoena issued in contravention of the guidelines.[163] Although some courts cite failure to follow the guidelines as a reason for quashing a subpoena,[164] others find the government's failure to follow the guidelines irrelevant.[165]

The problem with the existing guidelines is twofold. First, the guidelines' instructions to strike the "proper balance" leaves too much discretion to the government to compel journalists to reveal their sources. The guidelines provide no enforceable rights and are merely intended to guide the discretion of prosecutors.[166] Thus, it is up to the prosecutors to strike the balance without any course of legal redress for the subpoenaed journalist. Second, the guidelines are not a statute nor established case law, and thus can be changed at the whim of the current administration. This could result in an increase in protections, such as when the Department of Justice updated the guidelines in 2015 following a public outcry when it was revealed that the Department of Justice had secretly seized records from the Associated Press telephone lines.[167] However, this could also result in a significant

161. 28 C.F.R. § 50.10(a)(2) (2019) ("In determining whether to seek information from, or records of, members of the news media, the approach in every instance must be to strike the proper balance among several vital interests: Protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of the free press in fostering government accountability and an open society.").

162. *Id.* § 50.10(c)(4)(iii)–(v).

163. *Id.* § 50.10(i), (j).

164. *See, e.g.*, *In re* Williams, 766 F. Supp. 358 (W.D. Pa. 1991).

165. *See, e.g.*, United States v. Long (*In re* Shain), 978 F.2d 850 (4th Cir. 1992).

166. 28 C.F.R. § 50.10(j) ("This policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."); *see also In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1152 (D.C. Cir. 2006) (refusing to decide whether the DOJ guidelines were followed by special counsel because the guidelines created no enforceable right for appellants).

167. Press Release, U.S. Dep't of Justice, Statement of Attorney General Eric Holder on the Justice Department Report of Revised Media Guidelines (July 12, 2013),

rollback in protections, as many feared when then-Attorney General Jeff Sessions announced in 2017 that he would review policies on media subpoenas as part of the Trump administration's focus on government leaks.[168]

2. Absolute Privilege

The basis of arguments in favor of an absolute privilege are rooted in the First Amendment, and proponents argue that an absolute privilege would best fulfill the intent of the Framers by allowing journalists to serve as a check on the government.[169] Proponents argue that an absolute shield law would encourage whistleblowers to expose government misconduct and allow journalists to serve as a check on the government without fearing jail time.[170] Proponents also argue that an absolute privilege would provide judicial efficiency, as courts would not need to balance claims of privilege on a case-by-case basis.[171] Further, an absolute privilege would promote uniformity of the law and prevent uncertainty in protection regardless of the court in which a journalist is subpoenaed.[172]

Most proponents of an absolute privilege argue that a qualified privilege is insufficient to adequately protect journalists. Proponents worry that a qualified privilege based on a balancing test would leave too much discretion to the courts and perpetuate the current disparity of protection that exists as a result of the current scheme.[173] One argument against a qualified privilege that is commonly raised by proponents of an absolute privilege is that a qualified privilege does not give journalists enough uniformity to rely on. As Justice Douglas cautioned in his dissent in *Branzburg*, a qualified evidentiary privilege can be manipulated by politicians or courts to fit with the politics of the time or the politician's particular view of the worth of state

https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-justice-department-report-revised-media-guidelines; *see also Gov't Obtains Wide AP Phone Records in Probe*, ASSOCIATED PRESS (May 13, 2013), https://www.ap.org/ap-in-the-news/2013/govt-obtains-wide-ap-phone-records-in-probe (explaining the government seizure and the Associated Press's response).

168. Josh Gerstein & Madeline Conway, *Sessions: DOJ Reviewing Policies on Media Subpoenas*, POLITICO (Aug. 4, 2017, 1:45 PM), https://www.politico.com/story/2017/08/04/doj-reviewing-policies-on-media-subpoenas-sessions-says-241329.

169. Siegel, *supra* note 132, at 474–75.

170. *Id.* at 524.

171. *E.g.*, *id.* at 473.

172. *Id.* at 521.

173. *Id.* at 520.

objectives.[174] The majority also believed that a qualified privilege would not be effective in instilling confidence in sources that their identities would not be revealed.[175]

Without an absolute privilege, proponents worry that journalists will engage in self-censorship, and the public will not receive vital information uncovering government misconduct.[176] Proponents also argue that having no absolute privilege will lead to the self-censorship of sources who investigate the current scheme of protection and realize that their confidentiality is not assured unless the journalist is willing to go to jail for them.[177]

3. Qualified Privilege

Although the argument for a qualified evidentiary privilege relies on many of the same First Amendment freedom of the press arguments as proponents of an absolute privilege, a qualified privilege provides a fair balance between the concerns of a free press and national security. Most previously proposed federal legislation has been federal shield laws affording journalists with a qualified privilege. A law providing for a qualified privilege is more likely to gain support than a law providing for an absolute privilege, which many fear would improperly impede upon the government's need for secrecy for national security purposes. Under a qualified scheme, the government would still be able to prosecute individuals for criminal acts or acts of terrorism, or to pursue leakers of information that improperly exposed state secrets. Most states have opted for a qualified evidentiary privilege under their respective state protections, and even those states with absolute privileges have found their privilege undercut by constitutional concerns.[178] Thus, the current scheme evidences more support and less pushback for a qualified privilege than an absolute privilege.

174. Branzburg v. Hayes, 408 U.S. 665, 711 (1972) (Douglas, J., dissenting).
175. *Id.* at 702 (majority opinion).
176. Siegel, *supra* note 132, at 524.
177. *Id.*
178. *Supra* Part II.

C. Evaluation of Previous Legislative Attempts at Federal Shield Laws

Even at the time *Branzburg* was decided, federal statutes granting journalists a testimonial privilege had already been proposed.[179] More recently, a federal shield law titled "The Free Flow of Information Act" has been regularly introduced in Congress. The Free Flow of Information Act of 2007 was passed by the House of Representatives by a significant bipartisan majority of 398–21 but did not pass a cloture vote in the Senate in 2008,[180] in part because of the opposition by the Department of Justice and the threat of a potential veto by President George W. Bush, who was concerned about the impact the legislation would have on terrorism concerns.[181] Similarly, the Free Flow of Information Act of 2009 passed the House and was never voted on by the Senate.[182] The Free Flow of Information Act of 2013 was introduced to the Senate but was not enacted before the Congress adjourned.[183] In 2015, the House passed an amendment to another House bill to protect journalists, but the provision was removed from the version that ultimately passed the Senate.[184]

The most recent hope for a federal shield law was the Free Flow of Information Act of 2017, a house bill introduced on November 14, 2017, by Representative Jamie Raskin.[185] The bill is identical to the Free Flow of Information Act of 2007[186] and was introduced after

179. *Branzburg*, 408 U.S. at 689 n.28.

180. S. 2035, 110th Cong. (2007); H.R. 2102, 110th Cong. (2007).

181. Upohar Haroon, *Free Flow of Information Act*, FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1083/free-flow-of-information-act (last updated 2018). Despite this, the bill had significant support from various major media companies including the Associated Press, the National Association of Broadcasters, Bloomberg News, CBS, ClearChannel, CNN, Cox, Gannett, Hearst, NBC, News Corporation, the New York Times, TIME, and the Washington Post. *House Passes the Free Flow of Information Act*, SPEAKER OF THE HOUSE (Oct. 16, 2007), https://www.speaker.gov/newsroom/house-passes-the-free-flow-of-information-act.

182. *Federal Shield Law Efforts*, Reporters Committee for Freedom of the Press, https://www.rcfp.org/federal-shield-law/ (last visited Feb. 23, 2020).

183. *Id.*

184. H.R. 2578, 114th Cong., H. Amendment 333 (2015) ("None of the funds made available by this Act may be used to compel a person to testify about information or sources that the person states in a motion to quash the subpoena that he has obtained as a journalist or reporter and that he regards as confidential."); Josh Gerstein & Seung Min Kim, *House Passes Reporter's Shield Measure, Again*, POLITICO (June 3, 2015, 6:44 PM), https://www.politico.com/blogs/under-the-radar/2015/06/house-passes-reporters-shield-measure-again-208206.

185. Free Flow of Information Act of 2017, H.R. 4382, 115th Cong. (2017).

186. Press Release, Jaime Raskin, U.S. Congressman, 8th Dist. of Md., Reps. Raskin & Jordan Introduce Bipartisan Federal Press Shield Law (Nov. 14, 2017), https://raskin.house.gov/media/

then-Attorney General Jeff Sessions would not make a commitment not to jail journalists.[187] The bill's stated purpose was "[t]o maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media."[188] The bill had twelve cosponsors, both Democratic and Republican.[189] Raskin and supporters argued that the bill was vital to guarantee First Amendment protections by allowing journalists to protect confidential sources and be free of the fear of prosecution or jail time.[190] As of December 2017, the bill was referred to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations but was stalled until Congress adjourned on January 3, 2019.[191]

The bill would have provided journalists a qualified privilege. Journalists would still be forced to reveal sources or documents related to their investigation if: (1) the party seeking to compel production could prove it had exhausted other options for obtaining the information,[192] (2) the information sought was "critical" to the investigation,[193] and (3) "the public interest in compelling disclosure of the information or document involved outweigh[ed] the public

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press-releases/reps-raskin-jordan-introduce-bipartisan-federal-press-shield-law [hereinafter Press Release of Jaime Raskin].

187.

> I don't know if I can make a blanket commitment to that effect. . . . [W]e have matters that involve the most serious national security issues that put our country at risk, and we will utilize the authorities that we have legally and constitutionally if we have to. We always try to find an alternative way . . . to directly confronting media persons. But that is not a total blanket protection.

Oversight of the Department of Justice: Hearing Before the S. Comm. on the Judiciary, 115th Cong. (2017) (statement of Hon. Jefferson B. Sessions III, Att'y Gen. of the United States), https://www.judiciary.senate.gov/meetings/10/18/2017/oversight-of-the-us-department-of-justice.

188. Free Flow of Information Act of 2017, H.R. 4382, 115th Cong. (2017).

189. Cosponsors were: Jim Jordan (R-OH 4th), Grace Meng (D-NY 6th), Eleanor Holmes Norton (D-DC), Alex X. Mooney (R-WV 2nd), John Yarmuth (D-KY 3rd), Mark Meadows (R-NC 11th), Debbie Wasserman Schultz (D-FL 23rd), Scott Taylor (R-VA 2nd), Sheila Jackson Lee (D-TX 18th), Michael Simpson (R-ID 2nd), and Robert A. Brady (D-PA 1st). H.R.4382—Free Flow of Information Act of 2017, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/4382/cosponsors?searchResultViewType=expanded&KWICView=false (last visited Feb. 23, 2020).

190. Press Release of Jaime Raskin, *supra* note 186. Familiarly, Raskin also commented on the democratic principle behind the freedom of the press, stating, "When the press is unable to do its job, the American people—and our ability to function as a democracy—suffer. A free press is the people's best friend and the tyrant's worst enemy." *Id.*

191. H.R. 4382—Free Flow of Information Act of 2017, *supra* note 189.

192. *Id.* § 2(a)(1).

193. *Id.* § 2(a)(2).

interest in gathering or disseminating news or information."[194] The third of these requirements calls for a balancing test, not unlike that proposed by Justice Powell in *Branzburg*. The most obvious problem with this requirement is that it allows the courts substantial latitude to interpret the statute. It is entirely possible that certain courts or judges will consistently rule in favor of the government, making the statute a hollow symbol of protection for freedom of the press.

The bill also included a caveat for when the disclosure of the identity of a source is "necessary to prevent, or to identify any perpetrator of, an act of terrorism against the United States or its allies or other significant and specified harm to national security with the objective to prevent such harm,"[195] as well as other terrorist-related exceptions. These exceptions, which were largely uncontested by congressmembers and which have survived several iterations of the bill, fairly address concerns that journalists might improperly invoke the privilege when national security is an obvious concern.

The bill also contained a restrictive definition of "journalist." A "covered person" as defined by the Act is:

> a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person's livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person.[196]

This description would not encompass the emerging field of so-called "citizen journalists" and bloggers, which has become increasingly powerful as technology allows it to quickly reach large audiences.[197] Past iterations of the Free Flow of Information Act were stalled by similarly lengthy and restrictive definitions of a journalist, and state

194. *Id.* § 2(a)(4).

195. *Id.* § 2(a)(3)(A).

196. *Id.* § 4(2).

197. Alan Wehbé, *The Free Press and National Security: Renewing the Case for a Federal Shield Law*, 16 FIRST AMEND. L. REV. 512, 529–30 (2018); Dell Cameron, *A New Media Shield Law Would Only Shield Corporate Media*, VICE (Aug. 22, 2013, 1:14 PM), https://www.vice.com/en_us/article/bn5g7a/the-new-media-shield-law-only-shields-corporate-media.

shield laws also vary widely in how a journalist is defined.[198] A stronger definition would focus on the intent of the individual rather than on his or her employment or the regularity of his or her reporting. The definition would also focus on the individual's ability to analyze and verify the credibility of his or her sources and the information he or she is provided. These improvements would address both the concerns of opponents of the law who fear undeserved protections and the concerns of those who want to encompass new-style media outlets deserving of protection.

IV. PROPOSAL

A. Consequences of Not Protecting Journalists' Sources by Statute

The majority in *Branzburg* noted that "the press has flourished" without constitutional protection.[199] However, the reality does not reflect that sentiment. As discussed above, the freedom of the press in the United States has never been assured.[200] Continuing to leave journalists without assurances that they will be protected against government subpoenas and subjecting them to criminal contempt for refusing to reveal their sources does not leave the press "flourishing."

To continue without a federal shield law despite the support for such a proposal since the ruling on *Branzburg* would leave journalists in a state of limbo, relying on state protections, subjective balancing tests, or the whims of the current administration. As explained above, opponents of a federal shield law have argued that journalists are sufficiently protected without a shield law because of Department of Justice regulations on subpoenaing the media.[201] However, proponents of a federal shield law point out that these regulations are insufficient because they are not enforced by the courts and because there is little to no punishment for officials who fail to follow them.[202] The balancing test proposed by the regulations is highly subjective and could be manipulated based on the Department of Justice's viewpoint on these considerations.[203]

198. Wehbé, *supra* note 197, at 532; Cameron, *supra* note 197.
199. Branzburg v. Hayes, 408 U.S. 665, 689–99 (1972).
200. *Supra* Part I.
201. *Supra* Part III.
202. Siegel, *supra* note 132, at 504.
203. *Id.* at 505.

The inevitable and dangerous result of leaving journalists without statutory protections against revealing their sources is that the government will be emboldened to induce disclosure of confidential sources and information by following through on subpoenas and sending principled journalists who refuse to give up their sources to jail. In the hands of the wrong organization, subpoenas can be used to harass journalists, interfere with their sources, or retaliate against journalists who are critical of the government. The fallout from these consequences is that sources will not reveal information in the first place because they do not have reliable protection against being identified. Despite the verve of the journalistic profession, sources will doubtless be deterred by the threat of being identified when the journalist is subpoenaed. Thus, without a sufficient shield law, the press will be unable to report about alternative viewpoints or subversive organizations, the very things the First Amendment was intended to protect.

B. Impact

A federal shield law of any kind, whether qualified or absolute, would positively influence journalists and contribute to the freedom of the press in the United States. A federal shield law would resolve the inconsistencies resulting from the different interpretations of *Branzburg* among the federal courts, as well as provide uniform protection to journalists instead of forcing them to rely on the protections of the confusing patchwork of state shield laws. No longer would journalists and their sources depend on the whims of the Department of Justice or the discretion of the courts for protection.

Increased protections for journalists will not prevent the government from protecting national security interests, as the two are not necessarily at odds. A qualified evidentiary privilege under a federal shield law can properly strike the balance between national security and the freedom of the press, both of which are necessary for a well-functioning democracy. And as technology improves, the government will find the need to rely on journalists for information dealing with national security less and less.[204]

204. Technology makes it easier for the government to get information through other channels and, in fact, has been cited as the main factor in the increase in leak prosecutions during the Obama administration. Joel Simon & Alexandra Ellerbeck, *The President's Phantom Threats*, COLUM. JOURNALISM REV. (Winter 2018), https://www.cjr.org/special_report/president-threats-press.php.

C. Solution

The Supreme Court in *Branzburg* encouraged Congress to pass a federal shield law,[205] and it is time that Congress act upon that invitation. Affording journalists a qualified evidentiary privilege is the best solution. Given the difficulty in passing any legislation,[206] legislation with a more moderate approach is the most viable option. Congress has thus far failed to create a federal shield law that garners enough bipartisan support to actually become law. However, there is considerable support for a shield law offering a qualified privilege, as evidenced by congressional support for the different iterations of the Free Flow of Information Act,[207] the willingness of the courts to find an evidentiary privilege post-*Branzburg*,[208] and the near nationwide creation of state shield laws by state legislatures.[209]

The argument in favor of an evidentiary privilege is also well-grounded in the rationale supporting existing privileges. The ability to remain anonymous is necessary to ensure the open communication between a source and a journalist that is needed for journalists to disseminate information to the public. The relationship between journalist and source serves the public interest and should be recognized, as other privileges, as an interest more important than the interest in providing the relevant information in a litigation.

1. Proposal

The following is my proposal for a federal shield law, based largely on the Free Flow of Information Act of 2017 and edited with language from several state shield laws to properly strike the balance between national security and the freedom of the press:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Free Flow of Information Act."

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205. Branzburg v. Hayes, 408 U.S. 665, 706 (1972).

206. An analysis of data beginning with the 93rd Congress through the 115th Congress revealed only 6 percent of legislation introduced in a congressional session ever became law. In contrast, 80 percent or more of legislation each session was introduced, referred to committee, or reported by committee but had no further action. *Statistic and Historical Comparison*, GOVTRACK, https://www.govtrack.us/congress/bills/statistics (last visited Feb. 23, 2020).

207. *Supra* Part III.

208. *Supra* Part II.

209. *Supra* Part II.

SEC. 2. COMPELLED DISCLOSURE FROM COVERED PERSONS.

(a) Conditions For Compelled Disclosure—In any matter arising under Federal law, a Federal entity may not compel a covered person to provide testimony or produce any document related to information obtained or created by such covered person as part of engaging in journalism unless a court determines by clear and convincing evidence, after providing notice and an opportunity to be heard to such covered person—

(1) that the party seeking to compel production of such testimony or document has exhausted all possible alternative sources (other than the covered person) of the testimony or document;

(2) in the case that the testimony or document sought could reveal the identity of a source of information or include any information that could reasonably be expected to lead to the discovery of the identity of such a source, that—

(A) disclosure of the identity of such a source is necessary to prevent, or to identify any perpetrator of, an act of terrorism against the United States or its allies or other significant and specified harm to national security with the objective to prevent such harm;

(B) (i) disclosure of the identity of such a source is essential to identify in a criminal investigation or prosecution a person who without authorization disclosed properly classified information and who at the time of such disclosure had authorized access to such information; and (ii) such unauthorized disclosure has caused or will cause significant and articulable harm to the national security; and

(3) that compelling disclosure of the information or document involved is necessary to address harm to national

security which significantly outweighs the public interest in gathering or disseminating news or information.

(b) Limitations On Content Of Information—The content of any testimony or document that is compelled under subsection (a) shall—

(1) not be overbroad, unreasonable, or oppressive and, when possible, be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and

(2) be narrowly tailored in subject matter and period of time covered so as to avoid compelling production of peripheral, nonessential, or speculative information.

SEC. 3. COMPELLED DISCLOSURE FROM COMMUNICATIONS SERVICE PROVIDERS.

(a) Conditions For Compelled Disclosure—With respect to testimony or any document consisting of any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person, section 2 shall apply to such testimony or document if sought from the communications service provider in the same manner that such section applies to any testimony or document sought from a covered person.

(b) Notice And Opportunity Provided To Covered Persons—A court may compel the testimony or disclosure of a document under this section only after the party seeking such a document provides the covered person who is a party to the business transaction described in subsection (a)—

(1) notice of the subpoena or other compulsory request for such testimony or disclosure from the communications service provider not later than the time at which such subpoena or request is issued to the communications service provider; and

(2) an opportunity to be heard before the court before the time at which the testimony or disclosure is compelled.

SEC. 4. APPELLATE PROCEDURE.

(a) Order Subject to Review—If a court determines that a covered person should be compelled to testify, the court's determination shall immediately be subject to review by the court of appeals. The court of appeals shall make an independent determination of the applicability of the standards in this subsection to the facts in the record and shall not accord a presumption of correctness to the trial court's findings.

(b) Pendency of Appeal—During the pendency of the appeal, the privilege shall remain in full force and effect.

SEC. 5. DEFINITIONS.

In this Act:

(1) COMMUNICATIONS SERVICE PROVIDER—The term "communications service provider"—

(A) means any person that transmits information of the customer's choosing by electronic means; and

(B) includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in sections 153 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230)).

(2) COVERED PERSON—The term "covered person" means a person who gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information with the intent of disseminating that news or information to the public and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person. Such term shall not include—

(A) any person who is a foreign power or an agent of a foreign power, as such terms are defined in section 101 of

> the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);
>
> (B) any organization designated by the Secretary of State as a foreign terrorist organization in accordance with section 219 of the Immigration and Nationality Act (8 U.S.C. 1189);
>
> (C) any person included on the Annex to Executive Order No. 13224, of September 23, 2001, and any other person identified under section 1 of that executive order whose property and interests in property are blocked by that section;[210]
>
> (D) any person who is a specially designated terrorist, as that term is defined in section 595.311 of title 31, Code of Federal Regulations (or any successor thereto); or
>
> (E) any terrorist organization, as that term is defined in section 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi)(II)).
>
> (3) DOCUMENT—The term "document" means writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).
>
> (4) FEDERAL ENTITY—The term "federal entity" means an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process.
>
> (5) JOURNALISM—The term "journalism" means the gathering, preparing, collecting, writing, editing, filming, taping, or photographing news and information with the intent of disseminating that news or information to the public.

210. Executive Order 13,224 was issued in response to the September 11, 2001 attacks and has been regularly updated since. The intent of the order is to disrupt the financial support of terrorist organizations. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

2. Explanation of Proposal

The first significant change in this proposed legislation from the Free Flow of Information Act of 2017 is that it increases the burden of proof on the government from a "preponderance of the evidence" to "clear and convincing evidence." The increased burden of proof gives the court less discretion and makes it more difficult for a journalist to be required to reveal the identity of a confidential source or otherwise confidential information. As several states currently use the clear and convincing evidence standard in their state shield law provisions,[211] this is not an unworkable standard. This proposed legislation also increases the burden on the government to prove that compelling disclosure is necessary for national security purposes to place the presumption against disclosure and prevent the manipulation by the government that a weaker standard would allow.

This proposed legislation also removes the Free Flow of Information Act of 2017's differentiations in standards between civil and criminal cases, which draw from the differences enshrined in the Department of Justice guidelines. These standards are rejected because again they are too subjective and leave too much discretion to the courts, as they require the courts to interpret what "reasonable grounds," "critical to the investigation," or "critical to the successful completion of the matter" mean. Again, these standards are too subjective and are thus vulnerable to manipulation by the government.

This proposed legislation also eliminates several exceptions from the Free Flow of Information Act of 2017 that are not concerned with national security but does retain those dealing with national security, including the terrorism exceptions to the definition of a "covered person." While future legislation can address any other potential reasonable exemptions to a journalist's privilege against being compelled to reveal confidential information, the current academic and political struggle is over national security exemptions to the privilege. Although other provisions may be controversial, terrorism exemptions have persisted in several iterations of proposed federal shield laws.

211. District of Columbia (D.C. CODE ANN. § 16-4703 (West 2019)), Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2019)), Minnesota (MINN. STAT. §§ 595.021–595.025 (2019)), Oklahoma (OKLA. STAT. ANN. tit. 12, § 2506 (West 2019)), and Tennessee (TENN. CODE ANN. § 24-1-208 (2019)).

This proposed legislation also adds a provision similar to that of several state shield laws,[212] which provides for the immediate and independent review of an order to compel the journalist to testify. This provision is necessary to ensure that under this qualified scheme, the necessarily remaining subjective elements of the shield law are not abused. By providing an immediate check on any orders to compel testimony, journalists will have yet another protection from being forced to choose between making unwarranted disclosure and facing jail time or other sanctions.

Lastly, this proposed legislation also modifies the definition of a "covered person" and "journalism" in an effort to be more inclusive. This proposed definition is less focused on the covered person's status as regularly employed by a news media organization and encompasses citizen journalists and online or independent publishers who uphold the same ethical standards as traditional journalists. Thus, this definition strikes the balance between those concerned with the over-inclusiveness of a federal shield law and those concerned with providing protections for the emergence of less traditional journalists.

V. CONCLUSION

A federal shield law is many years overdue, and a qualified shield law is the most realistic means of accomplishing the goal of providing journalists with necessary protection. Relying on the discretion of the Department of Justice without any method of redress is simply insufficient. The Framers intended for the press to serve as a check on the government, and allowing journalists to promise their confidential sources that they will remain confidential is necessary for the flow of information from a source to a journalist, and from the journalist to the public. The rationale behind a federal shield law is identical to that of existing privileges: to promote full and frank communication between parties.

A qualified federal shield law like the one proposed in this Note would properly strike the balance between the need for journalistic integrity and the national security concerns of the government. By

212. Alaska (ALASKA STAT. §§ 09.25.300–09.25.390 (2014)), Illinois (735 ILL. COMP. STAT. 5/8-901 to 5/8-909 (2019)), Louisiana (LA. STAT. ANN. §§ 45:1451–45:1454, 45:1459 (2019)), Minnesota (MINN. STAT. §§ 595.021–595.025 (2019)), New Mexico (N.M. STAT. ANN. § 38-6-7 (West 2019)), Rhode Island (9 R.I. GEN. LAWS ANN. §§ 9-19.1-1 to 9-19.1-3 (West 2019)), and Tennessee (TENN. CODE ANN. § 24-1-208 (2019)).

eliminating much of the subjective nature of a qualified privilege, the proposed legislation would provide much needed uniformity to the current scheme of privilege, which is a patchwork of widely varied state protections and inconsistent federal interpretations of *Branzburg*. If Congress is committed to ensuring the freedom of the press and ensuring protections in an increasingly evolving landscape of news media, a federal shield law is necessary.